CHUNG KHIAW BANK LTD.

v.

LIN FOOK SOON

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL SUIT NO. K 402 OF 1988]
17 JANUARY 1991

LAND LAW: *Charge - Default in payments - Auction - Shortfall - Plea of non est factum - Effect of - Power of attorney not registered in the High Court - Whether valid - Notice of demand sent to defendant's attorney and notice of Collector addressed to defendant.*

By 2 memorandum of charges dated 1 December 1984 and registered against a said parcel of land, the plaintiffs at the request of the defendants agreed to grant banking facilities to two companies, company A for RM250,000 and company B for RM50,000 (the first charge and second charge respectively).

As a result of the default by the 2 companies and the defendant, the plaintiffs applied to the Collector of Land Revenue to sell the land by way of auction. An auction was held but the proceeds were insufficient to satisfy the 1st charge.

The plaintiffs applied for final judgment under O. 14 r. 1 of the Rules of the High Court 1980 and for statutory interest.

The defendant denied that the loans were made at his request, claiming that he was illiterate in the English language and therefore did not understand the nature of the power of attorney; further that the solicitors handling the matter had assured him that he would not be personally liable.

It was further contended that he was not served with any notices or schedules required for sale of the land or with any demand for any outstanding sum after deducting from the proceeds of the alleged sale. The defendant counterclaimed for damages and interest under s. 11 of the Civil Law Act 1956.

The issues were whether the defendant's execution of the power of attorney was sufficient to bind him, whether the chargor is the principal debtor and whether the shortfall can be recovered.

Held:

[1] Reading the power of attorney and the memoranda of charges, the defendant had given away all his powers to the 1st company to do what it liked with the land. He therefore cannot now place limitations and restrictions or parameters or seek to confine the exercise of such powers.

[2] The power of attorney was a valid document because in Sabah, there was no requirement to register it at the High Court.

[3] There was a valid demand as the notice by chargee was sent to the defendant's attorney, and the notice by the Collector that the chargee had applied for an order for sale was addressed to the defendant.

[4] In the absence of fraud or misrepresentation, the defendant is bound by the power of attorney.

[Plaintiff's application for final judgment allowed.]

Cases referred to:
Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors. [1989] 1 MLJ 47 ***(dist)***
Subramaniam v. Retnam [1966] 1 MLJ 172 ***(cit)***
Magnum Finance Bhd. v. Ling Sing Pin [1988] 2 MLJ 403 ***(dist)***
Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] CLJ (Rep) 182 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 11
Powers of Attorney Ordinance 1949, s. 4
Rules of the High Court 1980, O. 14 r. 1, O. 20 r. 3(1)

For the Plaintiffs - Richard Barnes; M/s. Shelley Yap Leong Tseu Chong Chia & Co.
For the Defendant - Sugumar Balakrishnan with Williamson Yahyu; M/s. David Fung & Williamson Co.

JUDGMENT

Syed Ahmad Idid JC:

Preliminary

The plaintiffs are a limited company incorporated in the Republic of Singapore and are duly licensed to carry on the business of bankers with a branch office at 70 Jalan Gaya, 88000 Kota Kinabalu, Sabah, Malaysia.

The plaintiffs claim against the defendant:

(1) the sum of RM185,728.03;

(2) agreed interest on the sum of RM142,350.48 at the rate of 12.5% per annum to be calculated from 1 May 1988 to the date of full settlement;

(3) agreed interest on the sum of RM43,377.55 at the rate of 7.5% per annum to be calculated from 1 May 1988 to the date of full settlement;

(4) costs;

(5) such other relief or remedy as the Court may deem fit to grant.

By a memorandum of charge dated 1 December 1984 and registered against the parcel of land held under Kota Kinabalu CL 015014061 (hereinafter called "the said land") the plaintiffs at the request of the defendant agreed to grant banking facilities to one T.S. Ng Kemajuan Sdn. Bhd. (hereinafter called "the 1st company") in the aggregate sum of RM250,000 (hereinafter called "the 1st charge).

By a second memorandum of charge registered 1 December 1984 against the said land the plaintiffs at the request of the defendant agreed to grant banking facilities to one Chang Li Sang Pemborong Bakti (hereinafter called "the 2nd company") in the aggregate sum of RM50,000 (hereinafter called "the 2nd charge").

Upon default of payment by the 1st and 2nd companies and the defendant under the 1st and 2nd charges, the plaintiffs applied to the Collector of Land Revenue to sell and did sell the said land by way of auction. The proceeds realised from that auction was not sufficient to satisfy the 1st charge. The balance of the loan outstanding after disposal was RM142,350.48.

The defendant denied that both loans of RM250,000 and RM50,000 were made at his request.

Matter in Court

Writ of summons was filed in Court on 28 July 1988. The matter had been called up on three occasions.

On 11 December 1990, the application for final judgment under O. 14 r. 1 was heard. The plaintiffs also applied for statutory interest and for order-in-terms of the summons filed.

Defence

The defendant claimed to be educated in the Chinese language and illiterate in the English language. The defendant said that only the contents of the said sale and purchase agreement was interpreted and explained to him before he signed it. No interpretation of the terms of the power of attorney was administered to the defendant. He claimed that the solicitors handling this matter and the 2 directors of the 1st company, namely Wong Nyiap Hin @ Vincent Wong and Ng Thien Su represented to him that the power of attorney was to enable the 1st company to develop the said land for which the 1st company may require to charge the said land to any financial institution and that none of these acts would render the defendant personally liable.

The defendant averred that if the allegation of sale of the said land by the Assistant Collector of Land Revenue by way of auction was true, the defendant has not been served with any notices or schedules required for sale of the said land or with any demand for any outstanding sum after deduction from the proceeds of the alleged sale.

The defence submitted the amended defence and counterclaim without leave of the Court under O. 20 r. 3(1) of the Rules of the High Court on 7 July 1989. Citing the particulars of loss as "the difference between the fair market value and the forced sale value of the said land", the defendant counterclaimed for:

(1) Damages;

(2) Interest pursuant to s. 11 of the Civil Law Act 1956 at such rate and for such period as the Court deems fit;

(3) Costs;

(4) Any other remedies the Court deems fit.

Facts

Was the defendant's signing of the power of attorney sufficient to bind him? The answer lies squarely on the terms and import of the power of attorney (Exhibit "FLCY3") which clearly shows that on 10 August 1984, Lin Fook Soon (the defendant) appointed "T.S. Ng. Kemajuan Sdn. Bhd." as his "true and lawful attorney" to "perform, transact and effectuate all or any of the acts, deeds, matters and things in respect of the said land" (that is, the land under Country Lease No. 015014061). The wordings and expression in the memorandum of charge together with the power of attorney must be read together.

At the sale by public auction on 13 June 1987, Mr. Lawrence Gimbang, with the highest bid at RM170,000 was declared the purchaser.

Legal Issues

Is the chargor the principal debtor and can the shortfall (after the sale of the land) be recovered? The answers are embodied within the documents signed by defendant. Mr. Sugumar stated that as the claims are under the memorandum of charge and the annexure, a demand was necessary. As there was no demand, there cannot be any cause of action. Cited in support of this was the case of *Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. &*

Ors. [1989] 1 MLJ 47.

The Court finds that case and our instant matter are not on all fours because in *Public Bank's* case:

> From the plaintiff's own documents, it is clear that the notice of demand dated 1 October 1986 although addressed to the first defendant, was acknowledged to have been received by a company called Sri Alam Sdn. Bhd., who is in no way connected to these proceedings.

whereas in our case the demand was sent to the attorney.

Secondly, it is clear that the auction had been held on 13 June 1987. Notice by chargee in case of default was sent to his attorney on 20 December 1986. Notice by Collector that chargee has applied for order of sale of land was addressed to defendant on 10 February 1987.

Is it the duty of the bank to inquire if (i) the defendant was competent in English; or (ii) that the charge was in respect of any business? or (iii) the loan was for a feasible venture:

(i) *Subramaniam v. Retnam* [1966] 1 MLJ 172 held: (1) despite the fact that the defendant was ignorant of the English language, he would be bound by the written contract entered into by him in the absence of fraud or misrepresentation.

(ii) *Magnum Finance Bhd. v. Ling Sing Pin* [1988] 2 MLJ 403 held: (3) as the charge created was a third party charge, the plaintiff owed a duty to at least inquire into the circumstances surrounding the execution of the power of attorney, the purpose of its execution and the limitations imposed on it by law.

But *Magnum's* judgment is confined to the joint venture agreement where certain issues were touched upon. One of such issues was questioned. In our instant case there is no issue outside of the power of attorney. The question in *Magnum's* was one whether the powers were exercised within the authority given. Siti Norma Yaakob J observed:

> A number of other authorities were also cited before me and it is clear from these authorities that when construing a power of attorney, general words need to be viewed in the light of the stated objects of the power of attorney which in this case are clearly outlined in the recitals limiting the exercise of Ban's powers in carrying out the terms and conditions of the agreement. I can only conclude that when approving the loan to the developer and accepting the charged documents executed by Ban, the plaintiff did not bother to look at the agreement and neither was it concerned with the legal construction of the power of attorney and it cannot therefore now disclaim knowledge of the agreement nor the legal construction of the power of attorney ...

(iii) In our case, the defendant gave away all his powers to the 1st company to do what it liked with the land. He therefore cannot now place limitations or restrictions or parameters or seek to confine the exercise of such powers.

Mr. Sugumar informed the Court that "the power of attorney must be registered in the Magistrates' Court" but added "I do not have any authority on this". Sadly, in Sabah, there is no requirement to register any power of attorney in the High Court unlike in West Malaysia where the Powers of Attorney Ordinance 1949 spells out that (s. 4):

> ... no instrument purporting to create a power of attorney shall have any validity ... until a true copy ... has been deposited in the office of an Assistant Registrar.

There was no argument that the power of attorney was not the defendant's.

Conclusion

On the admission of the defendant and the facts and laws put forward by both learned

Counsel, there is only one decision I can make and that is to grant plaintiff's summons-in-chambers application for final judgment under O. 14 r. 1 of the Rules of the High Court. I have reminded myself of what had been well decided in the Supreme Court case of *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] CLJ (Rep) 182 where it was held:

> (4) the underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

This is a clear case though an unfortunate one in that the defendant has lost his piece of land and now has to pay over the difference. Order-in-terms.

Also found at [1991] 3 CLJ 2139